PUBLIC PROSECUTOR

v.

ALIMJIM BIN KASSIM @ JOSEPH BIN KASSIM

HIGH COURT SABAH & SARAWAK, SANDAKAN
TUAN IAN H.C.CHIN J
[CRIMINAL APPEAL NO. S (41)11 OF 1994]
3 DECEMBER 1994

***CRIMINAL LAW**: Conviction of an offence punishable under s. 179 Penal Code read together with s. 22 Prevention of Corruption Act 1961 - Appeal against decision - Whether delay in delivering grounds of decision had prejudiced accused - Whether there was a failure to recognise that the offence has a component element of mens rea - Whether there was a failure to adequately consider the defence - Whether there was any misdirection - Accused fined RM400 with one month's default imprisonment - Prosecution appealing against inadequacy of sentence.*

The accused was charged with and convicted of an offence punishable under s. 179 of the Penal Code read together with s. 22 of the Prevention of Corruption Act 1961. The accused was fined RM400 in default one month's imprisonment. The accused appealed against the decision of the learned Magistrate and the prosecution appealed against the inadequacy of the sentence imposed.

Held:

[1] The delay of about three years in delivering the grounds of decision was inexcusable. Whilst it was true that inordinate delay in supplying the grounds of judgment would make an utter farce of the proper and expeditious administration of justice, the prejudice occasioned by the delay in this case is not such that the accused should be acquitted.

[2] On the accused's contention that the learned Magistrate had failed to consider that the offence had a component element of *mens rea* and had failed to adequately consider the defence, what the learned Magistrate had stated was her conclusion that the accused was steadfastly refusing to answer any question. It is therefore not a question of *mens rea* because the accused had intentionally refused to answer the question. It is more correctly a question of whether, as a matter of law, the accused who was visited by his alleged lawyer's ignorance of the law and who, as a result, refused to answer all questions put to him, could be convicted of the offence.

[3] It is a general principle and trite law that a mistake or ignorance of the law, however *bona fide*, is no defence to a charge of a criminal offence. In the circumstances there was no merit in these two grounds of appeal. Further there was no misdirection by the learned Magistrate on the issue of whether the questions posed were incriminatory and any misdirection on whether the accused was entitled to have a lawyer present at the interrogatory stage of the police investigation had no bearing in this case.

[4] On the question of sentence, if anything, the sentence was on the lenient side and the learned Magistrate failed to recognise the seriousness of the offence. It was not just a question of not answering but the refusal had hampered an investigation into the false documentation relating to the export of 285 logs by a company, allegedly with the connivance of someone in the Forests Department.

[5] Had it not been for the considerable delay in delivering the grounds of decision, a jail sentence would have been imposed to deter any recurrence. However, in view of the delay, the sentence should not be disturbed.

[Appeal dismissed].

Cases referred to:
Voon Chin Fatt v. PP [1948-1949] 15 MLJ 96 ***(refd)***
Tan Hun Wah v. PP [1994] 1 AMR 3:113 ***(refd)***
Nandini Satpathy v. P.L.Dani [1978] AIR 1025 at p. 1047 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112, 173A
Penal Code, s. 179
Prevention of Corruption Act 1961, s. 22

For the appellant - Martin Idang; M/s. Martin Idang Rantau Allion Mahap & Co.
For the respondent - Zahir Hussein Ahmad Shah, DPP.

JUDGMENT

Ian H.C. Chin J:

Introduction

This is an appeal against the decision of the learned Magistrate handed down on 3 June 1991 by which Alimjim bin Kassim @ Joseph bin Kassim ("the accused") was convicted of the following charge:

> That you on 13 October 1989 at about 9.45 a.m. at Ibu Pejabat Balai Polis Sandakan Bandar, Sim-Sim, Sandakan in the District of Sandakan, in the State of Sabah, being legally bound to give the information and to state the truth in respect of commission of an offence under Prevention of Corruption Act, 1961 (Laws of Malaysia Act No. 57) to a public officer, namely, Encik Mohd Nordin bin Omar Penolong Pegawai Siasatan Badan Pencegah Rasuah Sandakan did refuse to answer questions demanded of him touching that subject by the said public officer, in the exercise of his legal powers, and that you have thereby committed an offence punishable under s. 179 of Penal Code read with s. 22 of the Prevention of Corruption Act 1961 (Laws of Malaysia Act No.57).

The accused was fined RM400 with one month's default imprisonment. The accused filed his notice of appeal on 6 June 1991 while the Public Prosecutor also appealed against the inadequacy of the sentence. The learned Magistrate after some considerable delay delivered her grounds of decision on the 7 April 1994 which delay afforded one of the grounds of appeal. The section of the Penal Code under which the accused was convicted reads:

> Section 179. Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant, in the exercise of the legal powers of such public servant, shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to two thousand ringgit, or with both.

The legal provision under which the accused was bound to give truthful information is s. 112 of the Criminal Procedure Code which says:

> 112(i) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(ii) Such person shall be bound to answer all questions relating to such case put to him by such officer.

Provided that such person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

(iii) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(iv) A police officer examining a person under subsection (i) shall first inform that person of the provisions of subsection (ii) and (iii).

(v) A statement made by any person under this section whether or not a caution has been administered to him under s. 113(1) shall, whenever possible, be taken down in writing and signed by the person making it or affixed with his thumb print as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish.

Grounds of appeal

The grounds of appeal can be stated this way, viz:

(1) the delay in delivering the grounds of decision has prejudiced the accused;

(2) there was a failure to recognise that the offence has a component element of *mens rea;*

(3) there was a failure to adequately consider the defence;

(4) there was misdirection when it was held that certain questions and the answers to be given were not incriminatory; and

(5) there was misdirection when it was held that the accused was entitled to have his lawyer present at the interrogatory stage of the police investigation.

The Decisions

Delay

Almost half a decade ago even when word processors were unavailable, it was held in *Voon Chin Fatt v. PP* [1948-1949] 15 MLJ 96 that a delay of two years in delivering the grounds of judgment was unsatisfactory what more when, nowadays, a document can now be typed and corrected within a fraction of the time previously required. Recently the Supreme Court had the occasion in *Tan Hun Wah v. PP* [1994] 1 AMR 3:113 to remind all judicial officers that inordinate delay in supplying the grounds of judgment would make utter farce of the proper and expeditious administration of justice. There was a delay of three years in that case. Just as it was inexcusable in the two cases just referred to, it is so in the present case where there is a delay of about 3 years. It remains to be determined how this delay has prejudiced the accused. This, I will comment on when dealing with the sentence. The prejudice occasioned by the delay in this case is not such that the accused should be acquitted.

Mens Rea & Consideration of Defence

It is the contention of Mr. Martin Idang, Counsel for the accused, that *mens rea* is a component element of the offence and he referred the Court to *Nandini Satpathy v. P.L.Dani* [1978] AIR 1025 at p. 1047, where it is said:

We have no doubt s.179 I.P.C. has a component of *mens rea* and where there is no wilful refusal but only unwitting omission or innocent warding off, the offence is not made out. When there is reasonable doubt indicated by the accused's explanation he is entitled to its benefit and cannot be forced to substantiate his ground lest, by the process, he is constrained to surrender the very privilege for which he is fighting. What may apparently be innocent information may really be nocent or noxious viewed in the wider setting.

Mr. Martin Idang argued that the learned Magistrate did not address her mind on this point. The accused had in his defence said that he had consulted a lawyer who had advised him he can refuse to answer all the questions, in consequence of which he did as advised. Mr. Zahir Hussein Ahmad Shah, Deputy Public Prosecutor, agreed that *mens rea* was an ingredient of the offence but he submitted that the learned Magistrate had directed her mind to that ingredient and this, according to him, can be gathered from the following passage of her judgment, viz:

> The fact that the Accused refused to answer the Second last question in EXP5 which is a simple question indicate that he was not thinking and he was adamant not to answer any questions that followed the question on the TDP (EXP2).

What the learned Magistrate had stated was her conclusion that the accused was steadfastly refusing to answer any question which means the accused had intentionally refused to answer as a result of the accused being wrongly advised by a lawyer not to answer any question at all. It is, therefore, not a question of *mens rea* because the accused had intentionally refused to answer the question. It is more correctly a question of whether, as a matter of law, the accused who was visited by his alleged lawyer's ignorance of the law and who, as a result, refused to answer all questions put to him, could be convicted of the offence. That is another way of saying whether the accused's ignorance of the law is a defence. This brings me to the all familiar s. 79 of the Penal Code which says:

> Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it.

It is a general principle that a mistake or ignorance of law, however *bona fide*, is no defence to a charge of a criminal offence. It is trite law and I will not dwell on it. That, that is ignorance of the law, in fact was set up as a defence which the learned Magistrate had adequately considered. There are no merit in these two grounds of appeal.

Incriminatory Answers

It is the law that the accused is excused from answering "any question the answer of which would have a tendency to expose him to a criminal charge or penalty or forfeiture" (proviso to s. 112(ii) of the Criminal Procedure Code.) This aspect of the law is very well stated in *Nandini Satpathy v. P.L. Dani* [1978] AIR 1025, 1004, and I can do no better than reproduce what has been stated and which I am of the view is also the legal position in Malaysia, viz:

> 44. Phipson, it is true has this to say on self-incrimination: "The rule applies to questions not only as to direct criminal acts, but as to perfectly innocent matters forming merely links in the chain of proof." We think this statement too widely drawn if applied to Indian Statutory and Constitutional Law. Cross also has overstated the law, going by Indian provisions by including in the prohibition even those answers 'which might be used as a step towards obtaining evidence against him'. The policy behind the privilege under our scheme does not swing so wide as to sweep out of admissibility statements neither confessional *per se* nor guilty in tendency but merely relevant facts which, viewed in any setting, does not have a sinister import. to spread the net so wide is to make a mockery of his examination of the suspect, so necessitous in the search for truth. Overbreadth undermines, and we demur to such morbid exaggeration of a wholesome protection... And we are supported by meaningful hints from prior decision in *Kathi Kalu Oghad's* case [1962] 3 SCR 10 at p. 32; (AIR 1961 SC 1808 at p. 1815), this Court authoritatively observed on the bounds between constitutional proscription and testimonial permission:

> In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provisions, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused at least probable considered by itself.

The complain is directed at two questions which the learned Magistrate had adverted to in her judgment and they are these:

S: Adakah kamu pernah mendapat latihan berkaitan dengann cara-cara mengenai pasti jenis-jenis kayu balak?

J: Saksi tidak mahu menjawab.

S: Adakah semua yang kamu katakan itu semuanya benar dan betul mengenai perkara ini?

A: Saksi tidak mahu menjawab.

Mr. Idang submitted that the learned Magistrate should not have isolated the questions for consideration when determining whether the answer would tend to expose him to a criminal charge or penalty or forfeiture. He also submitted that the answers have a reasonable prospect of exposing him to guilt in some other accusation actual or imminent. It must be appreciated that every refusal to answer a question constitutes a separate offence. Take the first question just quoted which merely asked the accused whether he had any training in relation to the recognition of the different types of timber. Any answer to that question, whatever the answer may be, cannot by itself have any tendency to expose the accused to a criminal charge or penalty or forfeiture. It is in isolation that a question and the answer must be considered as was stated in the just quoted passage of the judgment of *Nandini Satpathy v. P.L. Dani*. The learned Magistrate had acted correctly and there is also no merit in this ground of appeal.

Presence of lawyer

Assuming that the learned Magistrate may have misdirected herself on the law regarding the right of a lawyer to be present at what particular moment, it has no bearing in this case. The accused had made up his mind not to answer even before any question was asked. It matters not whether his lawyer was allowed to be present or not since his lawyer had, according to the accused, already advised him not to answer.

Sentence

The accused was fined RM400 with a default term of one month's imprisonment. Mr. Martin Idang argued that the accused should have been released on bond under s. 173A of the Criminal Procedure Code. Apart from saying that the learned Magistrate should have taken into account the fact that the accused is a government servant, no background, antecedents and character of the accused were adverted to as justifying resort to s. 173A of the Criminal Procedure Code. If anything, the learned Magistrate failed to recognise the seriousness of the offence. It is not just a question of not answering but the refusal had hampered an investigation into the false documentation relating to the export of 285 logs by a company allegedly with the connivance of someone in the Forests Department. Therefore the sentence was on the lenient side. Had it not been for the fact that there was considerable delay in delivering the grounds of decision, I would have imposed a jail sentence to deter any recurrence. As it is, I do not propose to disturb the sentence. The appeal is dismissed.